Office - Supreme Court, U. S.
FILED
MAY 2 1952
CHARLES ELMORE CROPLEY
CLERK

LIBRARY
SUPREME COURT, U.S.

No. 747

In the Supreme Court of the United States

OCTOBER TERM, 1951

THE UNITED STATES OF AMERICA, APPELLANT

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

In the United States District Court for the Western District of Missouri, Western Division

Criminal No. 18068

UNITED STATES OF AMERICA

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN

STATEMENT AS TO JURISDICTION

In compliance with Rule 37 (a) (1) of the Federal Rules of Criminal Procedure and Rule 12 of the Rules of the Supreme Court of the United States, as amended, the United States submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the order of the District Court in this cause dismissing counts II–VI, VIII–XXVI, and XXVIII–XXXII, inclusive, of the information.

OPINION BELOW

The memorandum opinion of the District Court dismissing the counts of the information has not been reported. A copy of that opinion and a

copy of the order of the District Court denying a motion for a rehearing and modifying the opinion are attached hereto as an Appendix.

JURISDICTION

The order of the District Court dismissing the counts of the information was entered on January 15, 1952, and the order denying the Government's motion for rehearing was entered on March 10, 1952. The jurisdiction of the Supreme Court to review on direct appeal an order of a District Court dismissing an information, where such dismissal is based on the construction of the statute on which the information is founded, is conferred by the Criminal Appeals Act, 18 U. S. C. 3731. See also Rule 37 (a) (2), F. R. Crim. P. The following decisions sustain the jurisdiction of the Supreme Court: *United States* v. *Rosenwasser*, 323 U. S. 360; *United States* v. *Foster*, 233 U. S. 515, 522–523.

QUESTIONS PRESENTED

1. Whether, under Section 15 of the Fair Labor Standards Act, the failure to pay minimum wages or overtime rates constituted a separate offense as to each separate workweek.

2. Whether separate false entries as to the working records of different employees constituted separate offenses.

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fair Labor Standards Act of 1938 (52 Stat. 1060), as

amended by the Fair Labor Standards Amendments of 1949[1] (63 Stat. 910), are:

Section 6 (29 U. S. C. 206):

> (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—
>
> (1) not less than 75 cents an hour;

Section 7 (29 U. S. C. 207):

> (a) * * * no employer shall employ any of his employees who is engaged in commerce or in the production of goods for commerce for a workweek longer than forty hours, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

Section 11 (c) (29 U. S. C. 211 (c)):

> Every employer subject to any provision of this Act or of any order issued under this Act shall make, keep, and preserve such records of the persons employed by him and of the wages, hours, and other conditions and practices of employment, maintained by him, and shall preserve such records for such periods of time, and shall make such reports therefrom to the Administrator as he shall prescribe by

[1] The only change made by the 1949 amendments which is material here was to increase the minimum wage from 40 cents per hour to 75 cents per hour.

regulation or order as necessary or appropriate for the enforcement of the provisions of this Act or the regulations or orders thereunder.

Section 15 (29 U. S. C. 215):

(a) * * * it shall be unlawful for any person—

* * * * *

(2) to violate any of the provisions of section 6 or section 7, * * *

* * * * *

(5) to violate any of the provisions of section 11 (c), * * * or to make any statement, report, or record filed or kept pursuant to the provisions of such section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect.

Section 16 (a) (29 U. S. C. 216 (a)):

Any person who willfully violates any of the provisions of section 15 shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

STATEMENT

On July 30, 1951, an information containing 32 counts was filed charging defendants with violations of the Fair Labor Standards Act.

Counts I–VI charged the defendants with having wilfully failed to pay the statutory minimum wage to employee Mary Ellen Way for the workweek ending May 26, 1950, and the workweek ending October 7, 1950; to employee Josephine A. Kellerman for the workweek ending May 13, 1950, and the workweek ending May 20, 1950; and to employee Norma J. Smith for the workweek ending October 14, 1950 and the workweek ending December 9, 1950, in violation of Sections 6 and 15 (a) (2), *supra*.

Each of counts VII–XXVI charged the defendants, or some of them, with having wilfully failed to pay the statutory overtime compensation for work in excess of 40 hours during a specified workweek to a specified employee, in violation of Sections 7 and 15 (a) (2), *supra*. No two of the alleged offenses occurred during any one workweek, and the 20 weeks during which offenses were allegedly committed were scattered throughout a period of more than two years' time. The 20 alleged offenses involved 11 employees, and only in one case did two offenses as to the same employee occurr in successive workweeks (counts XXV and XXVI).

Each of counts XXVII–XXXII charged the defendants, or some of them, with having wilfully falsified the working records of a specified employee during a specified period of time, in each case longer than a workweek, in violation of Sections 11 (c) and 15 (a) (5), *supra*. No two

counts charged violations as to the same employee during consecutive periods of time.

The defendants moved to dismiss the information on the ground, *inter alia*, that it contained a multiplicity of counts, contending that Section 15 defined courses of conduct as offenses, not individual acts, and that therefore the multiple charges of a series of violative acts based on the workweek were arbitrary and improper. The District Court, interpreting defendant's motion as also attacking the charging of separate offenses as to each employee, agreed that the defined offenses were courses of conduct, not individual acts. Consequently, it held that only one offense could be charged for each type of violation of the statute, regardless of the number of overt acts which had been committed in violation of the requirements of the statute. Accordingly, all minimum wage counts except the first were dismissed, and a similar disposition was made with respect to the overtime and falsification counts. Thus, the District Court dismissed all counts of the information except counts I, VII, and XXVII on its construction of Section 15 of the Fair Labor Standards Act.

THE QUESTION IS SUBSTANTIAL

Since the original enactment of the Fair Labor Standards Act in 1938, hundreds of indictments or informations containing multiple counts charging wilful violations of the act have been

filed on the assumption that a violation of a particular duty as to each individual employee for each individual workweek constitutes a separate offense. Indictments or informations based on this theory have been before the courts, including this Court, on other issues, without any question having been raised as to the propriety of such definitions of the offenses involved.[2] The decision below, holding that there can be only one offense for each type of violation, regardless of the length of time or number of employees involved, presents a serious problem with respect to criminal enforcement of the act. If, in accordance with the opinion below, the Government should group together violations by an employer as to a number of employees over an extended period of time, other courts, adhering to the view that has so long prevailed, might well hold such an indictment duplicitous. If the long-standing practice is followed in other districts, future indictments and possibly present sentences under former indictments are subject to attack. It is therefore important to the effective enforcement of the Fair Labor Standards Act that early determination be made by this Court as to the

---

[2] *United States* v. *Darby Lumber Co.*, 312 U. S. 100; *United States* v. *Rosenwasser*, 323 U. S. 360; *United States* v. *Moore*, 185 F. 2d 93 (C. A. 5); *Hertz Drivurself Stations, Inc.* v. *United States*, 150 F. 2d 923 (C. A. 8); *United States* v. *Ewald Iron Co., Inc.*, 67 F. Supp. 67 (W. D. Ky.); *United States* v. *General Ribbon Mills, Inc.*, 47 F. Supp. 801 (E. D. Pa.).

nature of the offenses defined in the pertinent provisions of Section 15 of the act.

1. We submit that the view which has prevailed since the enactment of the statute is clearly correct, and that as to failure to pay minimum wages or overtime rates, each violation as to each workweek is a separate offense. Only the workweek presents a feasible delimitation of the offenses. In Section 7 of the act, 29 U. S. C. 207, the unit selected by Congress for determining whether overtime rates had been paid is the workweek. While Section 6 relates to hourly rates, the administrative construction, since the beginning, has been to use the workweek as the standard for determining whether the hourly minimum has been met. This construction has been upheld by the courts. *Tennessee Coal, Iron and R. R. Co.* v. *Muscoda,* 321 U. S. 590, 598; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572, 579; *Travis* v. *Ray,* 41 F. Supp. 6 (W. D. Ky.).[3] Thus, as to each week, there is an

[3] The workweek has been defined in Section 778.2 (c) of the Interpretative Bulletin on overtime compensation (Title 29, Chapter V, Code of Federal Regulations) as a fixed and regularly recurring period of 168 hours in 7 consecutive 24-hour periods, and that it need not coincide with the calendar week, but may be begun on any day and at any hour of the day and that once the beginning time of an employee's workweek is established it remains fixed regardless of the schedule of the hours worked by him. This position has been upheld in the courts. *Harned* v. *Atlas Powder Co.*, 10 Lab. Cas. CCH Par. 62,977, 301 Ky. 517, 192 S. W. (2d) 378; *Barclay* v. *Magnolia Petroleum Co.*, 13 Lab. Cas. CCH Par. 64,017 (Texas Civ. App.), 203 S. W. (2d) 626.

independent duty to pay the prescribed rates and keep the necessary records. And when Congress, in Section 15, made it an offense to violate the provisions of Sections 6 and 7, it must have intended to impose punishment for each failure to comply with that duty to pay the required rates as to each workweek.

Thus, the complete offense of wilful failure to pay the prescribed rates is established by proof of wilful failure to perform those acts as to any one employee in any workweek, whether or not the offense is ever repeated. This is not a continuing offense in the sense that, unless the project is discontinued altogether, it will necessarily continue in the same form. Cf. *In re Snow*, 120 U. S. 274; *Armour Packing Co.* v. *United States*, 153 Fed. 1, 5–6 (C. A. 8), affirmed, 209 U. S. 56, 77. The offenses here involved may not necessarily be repeated from week to week. An employer may pay less than the minimum, or fail to pay overtime, in one workweek and then fail ever again to do so. He may require an employee to work overtime one week during each of several months. He may require one employee to work overtime one week, and another to work overtime in some succeeding week. In this very case, the indictment alleges failure to pay overtime or minimum wages or to keep necessary records as to different individuals in widely separated weeks; only with respect to one employee in the minimum wage counts, and

one employee in the overtime counts are violations alleged to have occurred in two successive weeks. The offense is thus not by its nature continuous.

As this Court stated in *Blockburger* v. *United States,* 284 U. S. 299, the test to be applied is whether the individual acts are prohibited or the course of conduct which they constitute. We think it is clear, for the reasons set forth above, that Congress was punishing, not a scheme to fail to pay the prescribed rates or keep the necessary records, but the actual failure to perform the duty to pay the required rates per week. This statute is thus similar to those in which Congress has punished, not the act of being in business, but of making a sale. In such event, each sale by any person, whether in business or not, is a separate offense. *Blockburger* v. *United States, supra.* Similarly, under the mail fraud statute, since it is the mailing in furtherance of the scheme, and not the scheme itself, which constitutes the offense, each separate mailing is a separate offense, even though all are in furtherance of the same scheme. *Bozel* v. *United States,* 139 F. 2d 153 (C. A. 6); *Mitchell* v. *United States,* 142 F. 2d 480 (C. A. 10), certiorari denied, 323 U. S. 747. Under the statute here involved, the workweek is the unit, and there is a separate duty to each employee as to each workweek. The failure to perform that duty as to each week is,

therefore, a separate offense. This case does not present the problem of whether failure to pay more than one employee in the same workweek is a separate offense as to each employee, since the information does not charge more than one type of violation in any one particular week. It should be noted, however, that the act imposes on the employer the duty to pay *each* of his employees the minimum wage (Section 6), and not to employ *any* of his employees without paying overtime rates (Section 7). Each individual employee may, of course, individually recover the money unlawfully withheld. Thus, there is a separate duty to each employee and each breach of that duty must be a separate offense. Cf. *Ebeling* v. *Morgan,* holding that, under Section 189 of the Criminal Code, punishing the injuring of *any* mail bags, the cutting of six mail bags at the same time constituted six separate offenses; *United States* v. *Martinez-Gonzales,* 89 F. Supp. 62 (S. D. Cal.), holding that, where the defendant smuggled in several aliens, there was a separate offense as to each alien.

2. As to the keeping of records, it is clear that the records must relate to the duty of payment under the act and must therefore be accurate as to each workweek as to each employee. False records as to one employee for a particular period of time is a matter separate and apart from either (1) records as to the same employee for different

periods of time or (2) records as to other employees. Thus the separate entries charged in the indictment relate to different material matters and are therefore properly charged as separate offenses. Cf. *United States* v. *Adams*, 281 U. S. 202; *United States* v. *Berry*, 96 Fed. 42 (D. C. Va.), in which it was held that an officer of a national bank could be charged in the same indictment for making false entries in books, reports or statements of a bank.

It is respectfully submitted that the decision of the District Court, which is contrary to the interpretation of the Fair Labor Standards Act accepted since the enactment of the statute, is so clearly erroneous under the decisions of this Court that it may be properly reversed without further argument.[4]

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

APRIL 1952.

---

[4] The controlling legal principles are stated, and the authorities collected, in the Brief for the United States in *United States* v. *Michener*, 331 U. S. 789, No. 793, October Term, 1946.

APPENDIX

[Copy]

In the United States District Court for the Western District of Missouri, Western Division.

No. 18068

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN, DEFENDANTS

MEMORANDUM ON MOTION TO DISMISS, MOTION TO STRIKE, AND MOTION FOR BILL OF PARTICULARS

An information, containing thirty-two (32) counts, was filed in this criminal action, charging defendants with having violated the minimum wage, maximum hours, and record keeping provisions of the Fair Labor Standards Act of 1938, as amended. (*29 U. S. C. A. 206 (a) (1); 207 (a), and 211 (c)*). Counts 1 to 6 relate to failure to pay minimum wages; Counts 7 to 26, to failure to pay overtime compensation for work performed in a workweek longer than forty (40) hours; and Counts 27 to 32, to failure to keep, or the keeping of false, employment records. Two, or more, of the indivdual defendants are joined with the corporate defendant in each count.

A typical count of the information relating to minimum wages is as follows:

That the defendant Universal C. I. C. Credit Corporation, a New York corporation, the defendant George P. Neal, its Division Operations Manager, acting in its behalf and interest, and defendant Charles I. Conklin, its Branch Manager, acting in its behalf and interest, employers within the meaning of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1940, did, during the workweek hereinafter named, in the City of Kansas City, State of Missouri, within the Western District of Missouri, employ the employee hereinafter named in interstate commerce and in the production of goods for interstate commerce, and did unlawfully and wilfully fail to pay said employee for her work in interstate commerce and in the production of goods for interstate commerce wages at a rate not less than seventy-five (75) cents an hour, contrary to the Act referred to above (29 U. S. C. 206, 215 (a) (2)).

The workweek referred to is the workweek ending May 26, 1950, and the employee referred to is Mary Ellen Way.

As to Count II and subsequent counts relating to minimum wages, the information alleges, in each such count: (1) "Realleges all of the allegations contained in paragraph I of Count I of this Information." (2) "The workweek referred to is the workweek ending May 13, 1950, and the employee referred to is * * *"; then follows the name of a single employee.

As to the charges contained in the information relating to maximum hours, and the keeping of records, the same procedure is followed. Where

a certain individual defendant is charged with the corporate defendant, a full satement of the charge is made, and then as to each violation charged against that individul and the corporate defendant the proceeding allegations are adopted by reference; the workweek, or period of time involved, together with the name of a particular employee, is inserted in each subsequent count.

As to record keeping, the information alleges six different periods of time regarding the work records of four (4) different employees. In two such instances defendants are charged with having made false work records. Each count of the information specifically refers either to a violation of Section 15 (a) (2) or 15 (a) (5) of the Act, *supra.* (29 U. S. C. A. 215 (a) (2) and 215 (a) (5)).

Defendants lay siege to the information so filed, by way of motion to dismiss; motion to strike; and motion for bill of particulars. The gist of the motion to dismiss may be stated as follows: (1) Information fails to state facts sufficient to constitute an offense against the United States; (2) Information does not state facts sufficient to apprise defendants of what evidence they must be prepared to meet; (3) Allegations of information are indefinite as to particular acts charged, constituting elements of offense; (4) A multiplicity of counts are arbitrarily set forth in the information as to each employee and workweek alleged. In light of the conclusion hereafter reached, we need only consider assignments 1 and 4, *supra.* As to assignment 2, suffice it to say that an information need not reveal the evidence a defendant must meet; *Landay v. United States,*

108 F. 2d 698, certiorari denied, 309 U. S. 681. As to assignment 3, the same is without merit, as revealed by the ruling hereafter made regarding assignment 1.

Under *Rule 7 (c), F. R. Crim. P.,* an information that describes an offense with such certainty as to inform an accused of the offense charged, without particularizing the details thereof, is sufficient. *Tonker* v. *United States,* 178 F. 2d 712; *Todorow* v. *United States,* 173 F. 2d 439.

In Count I of the Information, sufficient facts are alleged to inform the corporate, and individual defendants Neal and Conklin, that they are charged with having violated Section 15 (a) (2), of the Fair Labor Standards Act of 1938, as amended, during the workweek ending May 26, 1950, with respect to the minimum rate of hourly wages paid to an employee named Mary Ellen Way, at the time employed in the production of goods for interstate commerce as set by Section 206 (a) (1) of said Act. The count of the information so alleging states all the facts essential to establish an offense having been committed against the United States. *United States* v. *Southern Advance Bag and Paper Co.,* 46 F. Supp. 105, affirmed, 133 F. 2d 449; *United States* v. *Barr & Bloomfield Shoe Mfg. Co.,* 35 F. Supp. 75. In Count IV the corporate and individual defendants Neal and Wolfe are likewise informed.

In Count VII of the information, facts are alleged that inform the corporate and individual defendants Neal and Conklin, that they are charged with having violated Section 215 (a) (2) of the Fair Labor Standards Act of 1938, as amended, during the workweek ending December

18, 1948, by requiring an employee, Charles A. Wynn, employed in production of goods for interstate commerce, to work longer than forty (40) hours in that workweek without paying said employee for the hours worked in excess of forty (40) at a rate of not less than one and one-half times the regular rate at which said employee was employed, as required by Section 207 of the Act. Count XVIII charges a similar offense as having been committed by the corporate and individual defendants Neal and Wolfe, during the workweek ending July 8, 1950, with respect to an employee named John E. Ennis. Said counts of the information allege ample facts to establish a crime as having been committed against the United States by the parties as therein charged.

Count XXVII of the information alleges facts that inform the corporate and individual defendants Neal and Conklin that they are charged with having failed to keep records as provided in Section 211 (c) of the Fair Labor Standards Act, between April 10, 1950, and May 27, 1940, with respect to an employee named James R. Granger, who was engaged in production of goods for interstate commerce and who was within the coverage of Sections 6 and 7 of said Act, in violation of Section 15 (a) (5) thereof. The corporate and individual defendants Neal and Wolfe are likewise so informed in Count XXIX of the information. So revealing, said counts allege facts constituting an offense against the United States. Consequently, there is no merit to assignment I of the motion to dismiss.

A more serious matter is presented by assignment 4, *supra*. The unit selected by Congress

for measuring the minimum compensation required to be paid employees covered by the Fair Labor Standards Act of 1938, as amended, in Section 6 thereof (*29 U. S. C. A. 206*), is the hour of work. In Section 7 of the Act (*29 U. S. C. A. 207*), the unit selected for determining whether overtime payments are due, is the workweek. *Tennessee Coal, Iron & R. R. Co.* v. *Muscoda,* 321 U. S. 590; *Overnight Motor Co.* v. *Missel,* 316 U. S. 572. As a result of the standards so contained in the Act, it is the contention of the Government that as to each employee that an employer fails to pay minimum compensation for a given hour's work; and, as to each workweek that an employer fails to pay to an employee overtime compensation, a separate offense is committed by the employer in violation of the provisions of the Act. It is defendants' contention that nowhere in the Fair Labor Standards Act of 1938, as amended, or the regulations promulgated thereunder, can any period of time, such as an "hour" or "workweek" be found as a unit of measurement constituting separate and single criminal violations under the Act, irrespective of the employee involved or the time during which an offense alleged thereunder occurred. In other words, defendants contend that the Fair Labor Standards Act does not proscribe, as a separate and individual crime, each distinct hourly failure on the part of an employer to pay minimum wages, or each failure to pay overtime compensation to an employee within the coverage of the Act, or the failure to keep individual work records, as to each employee, but only defines a single crime for the doing of any such unlawful acts;

and that as is defined in Section 215 (a) (2) and (5) of the Act. (*29 U. S. C. A. 215 (a) (2) (5)*). If defendants' contention is correct, then the information here contains many duplicitous counts and they should be dismissed.

Section 215 (a) (2) of the Act, *supra,* makes it "unlawful for any person * * * (2) to violate any of the provisions of Section 206 or Section 207 of this title, or any of the provisions of any regulation or order of the Administrator issued under Section 214 of this title"; subsection 5 thereof makes it an offense "to violate any of the provisions of Section 211 (c) of this title, or to make any statement, report, or record filed or kept pursuant to the provisions of such Section or of any regulation or order thereunder, knowing such statement, report, or record to be false in a material respect." Section 216 of the Act (29 U. S. C. A. 216), prescribes the penalties, civil and criminal, for violations of the Act. Subsection (a) of Section 216 is as follows:

> (a) Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

Subsection 216 (b) prescribes the civil liability of an employer who violates the provisions of Section 206, or Section 207; but we are not here concerned therewith, except to note that a civil cause

of action is thereby created in favor of *each* employee affected by any such violation of the Act.

It must be kept in mind that the Fair Labor Standards Act is remedial legislation. It is apparent from the character thereof that it was the intent of Congress that "industries engaged in commerce or in the production of goods for commerce" were to be covered thereby and required to comply with the remedy thus afforded, "to correct and as rapidly as practicable to eliminate the conditions" in industry and in interstate commerce that Congress had found to be "detrimental to the maintenance of the minimum standard of living necessary for the health, efficiency, and general well-being of workers." *29 U. S. C. A. 202.* To compel compliance with such legislation, Congress, in Section 215 of the Act, has defined certain prohibited acts, and declared it unlawful for any person (defined in Section 203 (a) of the Act) to act contrary thereto. As to any person who so violates the provisions of Section 215, Congress prescribed a criminal penalty in Section 216 (a) of the Act, *supra.* The question arises whether the offense so defined is susceptible of being divided into two or more offenses, each open to a separate prosecution, because of multiple failures on the part of an employer within a given period of time, to comply with the several provisions of the Fair Labor Standards Act, and regulations promulgated thereunder, as set forth in Section 215. To determine whether Congress thereby intended specific acts committed contrary to the mandate of certain sections of the Act, to be punishable, or whether the violation of any one

of the provisions of Section 215, constitutes merely a single offense, the test must be "whether the individual acts are prohibited, or the course of action which they constitute," is prohibited. "If the former, then each act is punishable separately * * * If the latter, there can be but one penalty." *Blockburger* v. *United States,* 284 U. S. 299, 302.

It seems clear when the purpose of the Fair Labor Standards Act, *supra,* is considered, that in defining prohibited acts thereunder, and prescribing a punishment for commission of the same, the Congress intended to make a "course of conduct" and not "individual acts" the gravamen of the offenses defined in Section 215 thereof. "The motive and purpose of the * * * regulation [is] to make effective the Congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions * * *." *United States* v. *Darby,* 312 U. S. 100, 115. In Section 202 of the Act, Congress manifests an intent that it is the regulation of "industries engaged in commerce or in the production of goods for commerce" that is being brought within the coverage thereof. By Sections 206 and 207 of the Act, a standard as to "minimum wages" and "Maximum hours" is established by which "industries engaged in commerce or the production of goods for commerce" must abide "with respect to each of its employees who are engaged in such commerce" (*ibid* p. 117). "Congress [thereby] adopted the policy of excluding from interstate commerce all goods produced for commerce which

did not conform to the specified labor standard." (*Ibid* p. 121).

To uniformly maintain that standard, the Congress made it unlawful for a person to engage in interstate commerce, or the production of goods for interstate commerce, if that person did not comply with Sections 206 or 207 of this Act. Thus it is seen that the prohibited act fixed by Congress is not to singly violate Sections 206 or 207 of the Act, but the failure to comply therewith while engaging in interstate commerce, or the production of goods for commerce. "Section 15 (a) (2) and Sections 6 and 7 [of the Act] require employers to conform to the wage and hour provisions with respect to *all* employees engaged in the production of goods for interstate commerce" (*ibid.* p. 117). For an employer to be so engaged and not comply with the standard set as to *all* employes producing goods for such commerce is for that person to violate a standard set by Congress. Inherently, such prohibition could only relate to a "course of conduct" and not individual acts constituting that course of conduct.

The mandate in Section 206 of the Act that "[e]very employer * * * pay to *each* of his employees" a minimum wage; and that contained in Section 207, that "[n]o employer shall * * * employ *any* of his employees" who are engaged in interstate commerce without paying overtime compensation, when considered in the light of the prohibited act defined in Section 215 (a) (2) can only be construed as meaning that each employer engaged in such commerce must conform to the above wage and hour standard of

the Act with respect to every one of his employees, and if he does not do so, then a singular offense is committed in violation of the Act, irrespective of the number of employees involved, and regardless of the period of time over which such action continues. The offense so committed is not divisible by the number of employees as to whose employment the employer fails to comply with the wage and hour provisions of the Act. Failure to comply as to one or all of such employees produces a single result, the violation of a "prohibited act."

When the penalties provided by Congress to be imposed upon a person who violates the standards set in the Fair Labor Standards Act are considered, it becomes more manifest that what Congress was attempting to control by such legislation was a "course of conduct" and not individual acts committed contrary to specific provisions of the Act. In Section 216, it is provided that "any person who wilfully violates any of the provisions of Section 215 * * * shall upon conviction be subject to a fine," etc. There can be no imprisonment as a part of punishment for such violation except after a conviction of a prior offense thereunder. A fine of not more than $10,000.00 may be imposed for a first offense. Congress in so providing certainly did not intend that a fine of such imposing proportions would be assessed, for a first offense, where only the failure to pay one of several employees a portion of a weekly wage is shown, and that failure to pay a different employee similar wages during the same period of time would subject an employer to

imprisonment for that singular act as a second offense.

The penalty prescribed in Section 216 (a) of the Fair Labor Standards Act is one to be imposed for a "course of conduct" pursued in violation of the provisions of Section 215. Section 215 prohibits a number of different courses of conduct that cannot be pursued by "persons" engaged in interstate commerce or the production of goods for commerce. In light of the remedy sought to be corrected, the commission of any one of these prohibited acts is an offense, subject to the penalty provided in Section 216, for such conduct. Therefore, the several offenses defined in Section 215 (a) (2) and (5) of the Fair Labor Standards Act are what may be termed "continuing offenses" the violation of which is committed by a single impulse, no matter how long the action continues, for which an inductment or information lies for each offense so defined. *In re Snow,* 120 U. S. 274; *Clawans* v. *Rives,* 104 F. 2d 240; 15 *Am. Jur.,* Sec. 381, p. 56.

That is not to say that the failure to abide by the standards set up by the Act as to a single employee could not, standing alone, be the subject of a criminal prosecution. The failure to comply as to "each employee" is a measurement of criminal liability, but when so measured it is not the "overt act" committed as to each employee, but the "course of conduct" that is the gravamen of the offense.

Being a crime of that nature we think that when an indictment is returned, or an information is filed, charging conduct in violation of the standards set up by the Fair Labor Standards Act;

but one entire offense, whether longer or shorter in point of duration; or whether it consists of one or a number of particular acts; is to be charged, respecting each prohibited act defined in Section 215 thereof. "The offense is [to be] laid as a continuing one, and a single one, for all the time covered by the indictment." *In re Snow, supra,* p. 282. Hence the prosecution is for all overt acts committed in consequence of the continuing crime, occurring prior to the time the prosecution is instituted. For that offense, a fine may be assessed under Section 216 (a). Subsequent prosecutions for similar acts would bring into play the "imprisonment" penalty of said Section. That must have been the intent of Congress, to enforce compliance with the standards set in the Fair Labor Standards Act.

The information in its several counts charges a separate crime for each violation by defendants of Sections 206, 207 and 211 (c) of the Act. As informed against, the defendants, if found guilty on all counts, are subject to a fine of $270,000.00, and upon conviction of all counts after the first, liable to total imprisonment for a term of seven and one-half years. Congress clearly did not intend any such consequences as a result of criminal prosecutions under the Fair Labor Standards Act. The offense with which defendants are charged is not the violation of Sections 206, 207 and 211 (c), but with violating Section 215 (a) (2) and (5). Section 215 (a) (2) and (5) prohibits an employer from committing one, as well as a series of acts. If a series of acts are committed in violation thereof, they are not to be broken down so as to subject an employer to the

single penalty that is provided in Section 216 (a) for each such act. The elements of the offense defined in Section 215 (a) (2) and (5) are a violation of other sections of the Act. Such offenses may occur by commission of simultaneous acts, or a series of acts, but if committed, only one crime is involved and that as to each of the prohibited acts. We are dealing here with a statute that defines single prohibited action on the part of an employer. That action may be constituted of various acts. Prosecution therefor should not be carved out of several instances where defendants failed to pay minimum wages, overtime compensation, or failed to keep records as required by the Act, and subject defendants to multiple punishment therefor. As Judge Yankwich said, in *United States* v. *Harris,* 26 F. Supp. 788, 789:

> When a statute denounces a series of acts or the doing of several things, but attaches one penalty only to them, the prosecutor, if he chooses less than all, and is unsuccessful, cannot then prosecute again under the portions of the statute he chose to omit.
>
> * * * "The law does not permit a single individual act to be divided, so as to make out of it two distinct, indictable offenses. [Citing cases.] Although when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can. Yet he is not at liberty to cut but once."
>
> Behind these principles is the fundamental thought that the prosecutor should not split one crime and prosecute it in parts.

Criminal statutes are to be strictly construed. There is no such thing as a constructive offense. To warrant punishment for the violation of a criminal statute, the statute must spell out the offense in the plainest terms. *Fasule* v. *United States,* 272 U. S. 620. Section 215 (a) (2) does not authorize prosecution for each failure to pay a minimum "hourly" pay to each employee during the same period of time, or each failure to pay overtime compensation as is here attempted to be done in the several counts of the information. Such counts considered in gross allege three distinct violations only of the Fair Labor Standards Act, to-wit: a failure to pay minimum wages; a failure to pay overtime compensation; and, a failure to keep records as required by the "standards" set forth in the Fair Labor Standards Act, *supra.*

Therefore, Counts II, III, IV, V, and VI of the information are dismissed as charging duplicitous violations relating to minimum wages, with that as charged in Count I.

Counts VIII to XXVI, inclusive, are dismissed for the same reasons; i. e., duplicitous charges as to that alleged in Count VII, relating to overtime compenstion. Counts XXVIII to XXXII are dismissed for duplicity in charging violations as to record keeping provisions of the Act, as alleged in Count XXVII.

The allegations of Counts VI, XVIII and XXIX, in which defendant Frank E. Wolfe is charged, in addition to the other defendants, will be considered as charging that defendant in connection with the charges contained in Counts I, VII and XXVII, retained in the information.

The second paragraph of each count not retained in the information shall be considered as charging an "overt act" respecting the charge to which it relates. Thus defendants are sufficiently informed as to all "overt acts" for which the prosecution is here made.

Defendants' several motions to strike and for bills of particulars are by the Court overruled. Defendants' several motions to dismiss are sustained as above indicated.

(S) ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 15th day of January 1952.

[Copy]

In the United States District Court for the Western District of Missouri, Western Division.

No. 18068

UNITED STATES OF AMERICA, PLAINTIFF

v.

UNIVERSAL C. I. T. CREDIT CORPORATION, GEORGE P. NEAL, FRANK E. WOLFE, AND CHARLES I. CONKLIN, DEFENDANTS

ORDER

Plaintiff's motion for a rehearing on motion to dismiss is by the Court overruled.

The original memorandum filed herein is modified, however, in the following respects:

On page 12 thereof, last paragraph, the figures $270,000.00" have been changed to "$320,000.00." Immediately following, the phrase, "and upon conviction of all counts after the first, liable to

total imprisonment for a term of seven and one-half years," is stricken therefrom.

IT IS SO ORDERED.

ALBERT A. RIDGE, *Judge.*

Dated at Kansas City, Missouri, this 10th day of March, 1952.

(Filed in United States District Court April 7, 1952.)

U. S. GOVERNMENT PRINTING OFFICE: 1952